1951

Ethel Louise Gregerson v. Equitable Life and Casualty Insurance Company : Brief of Respondent

Utah Supreme Court

Claude T. Barnes; Attorney for Respondent;

Case No. 7674

In the Supreme Court

OF THE

State of Utah

ETHEL LOUISE GREGERSON,
Plaintiff and Respondent,

— vs. —

EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY, a corporation.
Defendant and Appellant.

BRIEF OF RESPONDENT

CLAUDE T. BARNES,
Attorney for Respondent.

Statement of Points

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STATEMENT OF FACTS

Appellant has fairly stated the facts, although we should like to make this addition: (a) It was stipulated by counsel (R. 12) that when the new policy was issued on June 1, 1947, the old policy had been in effect since October 3, 1940.

STATEMENT OF POINTS

Respondent's Points are the exact opposite of Appellant's Points, Nos. 1, 2, 3, 4, namely, that the Court was correct in its rulings with respect to them.

ARGUMENT

1.

It is the position of the respondent, that *in consideration of the long duration of the prior term policy no physical examination of the insured was required either at the beginning or reinstatement of the present policy, as to any amount up to* $3,000.00.

We invite the Court's scrutiny of the policy (Exhibit "A") itself: On page 3 reference is made to an old policy (which it was stipulated had been in effect since October 3, 1940, a period of more than six years and seven months). This policy goes on to say:

> "Whereas Grant Gregerson the above (insured) has for a period of more than six months immediately last past been insured under a policy in the Mountain States Insurance Company; and
>
> "Whereas, all of the premiums due on said policy for a period of six months or more immediately prior to the date hereof have been paid before the same became delinquent;
>
> "Now, Therefore, in consideration of the premises, it is hereby agreed that the penalties contained in the commuted benefits provisions of this policy are hereby waived as to the said Grant Gregerson to the extent of the principal amount

of the policy heretofore in force upon the life of said insured, to wit: the sum of $3,000.00."

Now, if the Court will turn to page 2 of the policy, it will see what "penalties" are waived by the foregoing. We quote:

> "*Commuted Benefits.* (a) If the application of this poliy is accepted and a Policy issued without a satisfactory Medical Examiner's Report as a condition precedent to the taking effect of this Policy, the Insured must be in good and vigorous health and free from all bodily ailments and disease at the date of issue and delivery of this Policy or at the date of reinstatement after any lapse thereof. Otherwise, any benefits accruing under this Policy are hereby forfeited and the Company is relieved of all liability hereunder."

What was the penalty waived? It was the liability to take a physical examination and to be "free from all bodily ailments and disease" at the date of the policy or its reinstatement. That is our case; and it were almost supererogatory to go further. Such was the contract, an ordinary and common one, we take it, in the conversion of a term to a permanent life policy.

The application, physical examination, indeed all the appellant says, would be pertinent, indeed, if this policy were for *more* than the old one; but it is not—it is for the identical amount, $3,000.00.

That the Company itself so regarded it is apparent from the fact, that there is no evidence whatever that the insured was either invited or required to appear

before a Company doctor for physical examination at the date of this policy.

It is conceded by appellant that the rule of *strictissimi juris* applies to insurance policies, to protect the public. In the apt language of this Court (*Handley v. Mutual L. Ins. Co.*, 106 Utah 184, 147 P. 2d 319) it applies especially

> "in the case of contracts which are sold widely to the average man under sales talk which cannot be too technical in its expositions and yet which very easily lull him into a belief that he has purchased certain benefits which on closer scrutiny of the contract are asserted not to be included."

There is, however, no need to apply that rule here. Please reread the waiver *supra*. There is no ambiguity; there is nothing it could possibly refer to except physical condition and examination, the penalty listed under Commuted Benefits; and certainly the liability to physical examination is a very serious penalty. On January 31, 1950, the insured had carried this policy and its predecessor for over nine years, and we may assume that, as with all policies, a physical examination of him occurred at that early date. He could read; he could see that this policy waived all further physical examination up to the amount of the original policy—it said so. He could also read in this policy under Reinstatement (Exhibit A; quoted in Appellant's Brief p. 23):

> "This policy may be reinstated within thirty days and less than six months after a lapse on

payment to the Company of arrears of premium with interest at the rate of 5% per annum. . ."

When, therefore, he on February 2, 1950, tendered the premium only two days overdue (after carrying the policy for nine years) he was justified in the belief that the only penalty was interest on $15.69 at 5% for two days. But no—the Company required not only the premium but a physical examination, contrary to the waiver.

2.

"Courts do not favor forfeitures, particularly where they are the result of technical provisions in insurance contracts, and forfeitures are never permitted unless the right thereto is clearly established." 45 C.J.S. 150 Citing many cases.

It is interesting to note that appellant claims the waiver referred only to a reduction of benefits. As the lower Court said in effect to appellant's counsel at the trial: "You will talk a long time before you convince me that the liability to physical examination is a benefit—it was the very 'penalty' waived by the waiver."

3.

The Company by its own act imposed an illegal condition to its acceptance of a premium for re-instatement, hence it cannot now complain that such premium was not paid.

"Payment or tender of payment may be excused where, before the time therefor, if the Company has repudiated the contract, or by a

claim or forfeiture or otherwise has indicated that the tender would be of no avail." 45 C.J.S. 190. Cases cited.

Here the Company imposed the condition of a new physical examination, which it had no right to demand.

4.

This policy, dated June 1, 1947, was written after the present Utah Insurance law became effective. The law (Chap. 63, Laws of Utah, 1947) was S.B. No. 34, passed March 14, 1947, and effective May 13, 1947. This policy, therefore, automatically became subject to two provisions of the law, as if written into it:

(a) 43-22-1 (3)

> "A provision that the policy shall be incontestable after it shall have been in force during the lifetime of the deceased for a period of two years from its date."

(b) 43-22-1 (4)

> "A provision . . . . that all statements made by the insured, shall, in the absence of fraud, be deemed representations and not warranties. . . ."

The policy was dated June 1, 1947; the insured died April 8, 1950; and at his death the policy had been in effect two years, ten months, or two years, seven months, at the time of application for reinstatement. Aside from its contractual waiver of physical examination it was therefore incontestable for original representations anyhow.

All of appellant's argument is based on two misconceptions: (a) that the insured was required to be in "vigorous" health at the date of issue of the policy and (b) that a physical examination was prerequisite to reinstatement. To grant them were to make the waiver meaningless; hence, since the findings clearly set forth the clarity of the waiver, the judgment should be affirmed.

Respectfully submitted,

CLAUDE T. BARNES,
Attorney for Respondent.